81-1662

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MAR 4 1982
ALEXANDER L. STEVAS,
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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1981.

STATE OF ALABAMA ,
PETITIONER

VS.

TIMOTHY CHARLES DAVIS,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND THE COURT OF CRIMINAL APPEALS OF ALABAMA

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QUESTION PRESENTED

DOES THE DECISION OF THIS HONORABLE COURT IN BECK V. ALABAMA (447 U. S. 625 [1980]) REQUIRE THE AUTOMATIC RETRIAL OF ALL CASES TRIED UNDER THE ALABAMA CAPITAL PUNISHMENT STATUTE PRIOR THERETO WITHOUT REGARD TO THE EVIDENCE?

PARTIES

In the Circuit Court of Coosa County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, Petitioner herein and Timothy Charles Davis, Respondent herein.

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Davis v. State, (Cr. App. Ala., 1981) _____ So. 2d _____.

The same is submitted herewith as Appendix "A", hereto.

The opinion and orders of the Supreme Court of Alabama are not yet reported but will be reported as: Ex Parte: State, In Re: Davis v. State, (S. Ct. Ala. 1981) _____ So. 2d _____.

The same are submitted herewith as Appendix "B".

JURISDICTION

The order of the Supreme Court of Alabama denying certiorari was issued January 8, 1982, and this petition is filed within sixty (60) days of said date:

The jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Section on of the Fourteeth Amendment to the Constitution of the United States which reads as follows:

> "...All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the Unites States and the State wherein they reside. No State shall make or enforce any law which shall abridge the priviledges or immunities of citizens of the Unites States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction of equal protection of the law..."

STATUTORY PROVISIONS INVOLVED

Code of Alabama, 1975, Title 13, Sections 13-11-1 through 13-11-9.

STATEMENT OF THE CASE

Timothy Charles Davis, was indicted by the Spring, 1979, Term of the Coosa County, Alabama Grand Jury for the robbery-intentional killing of Avis F. Alford.

He entered a plea of not guilty at arraingnment, A trial upon the cause resulted in a verdict of guilty. A sentencing herein was conducted pursuant to Alabama's Death Pensalty Statute and produced a sentence of death. Before submission of any appellate briefs the case was reversed and remanded by the Alabama Court of Criminal Appeals on August 4, 1981. Petitioner's application for rehearing was overruled on October

6, 1981, without an opinion.

On Janurary 9, 1982, Petitioner's petition for a writ of certiorari was denied by the Alabama Supreme Court.

STATEMENT OF THE FACTS

Mrs. Avis F. Alford, an elderly white woman, ran a grocery store near the Respondent's residence. Late in the arfternoon of July 20, 1978, her friend, Mrs. Linnie G. Neighbors, left Mrs. Alford alive and well, but in the store alone.

A short time later another lady came in and made a purchase at the store and she too left Mrs. Alford alive and well, but alone.

A short time later a Mr. Robbins observied a young white male with a beard. The young man was riding on a gold-colored motorcyle

and wearing a gold-colored helmet. He also noticed that the rider had long light colored hair sticking out from under the helmet and was wearing jeans and a t-shirt. The rider turned into Mrs. Alford's store off Fishpond Road. Some twenty minutes later a Mr. Johnson saw a young man , white with a beard, on a gold-colored motorcycle wearing a gold-colored helmet with long light colored hair sticking out from under it. He was traveling at a high speed from the direction of Mrs. Alford's store down Fishpond Road toward its intersection with the Covered Bridge Road. The Covered Bridge Road is so named for the type of bridge on that road crossing a small creek. It is a dirt road. The bridge, its road and that road's intersection with the Fishpond Road is a relatively short distance from the Alford Store.

Near the bridge and on the bank

a Mr. Curtis Smith was tending to his bodily functions while his friend was in a car nearby in a semiconscious alcholic stupor. Smith heard a motorcycle on the Covered Bridge Road and looking up saw a young,white, bearded male, whom he later identified as the Respondent. He was riding a gold Honda motorcycle, wearing a gold-colored helmet. He was dressed in jeans,t-shirt, with his light colored hair sticking out and wearing tennis shoes. Smith watched the Respondent cross the bridge and disappear from sight. He noticed the sound of the motorcycle as the Respondent rode the motorcylce a short distance up the road. Smith heard the engine sound as if it were racing. Moments later Davis returned on the motorcycle came across the bridge and stopped at the edge of the creek where Smith was standing. Smith had a conversation with the

Respondent at the creek as the Respondent washed his hand and arm of what appeared to be blood. The Respondent told Smith that the "had a spill" with the motor indicating the reason for the blood on his arm and hand. Davis left Smith and rode the motor back toward Fishpond Road.

During the time the Respondent was at the creek or a short time thereafter, a Mr. Gene Harris, who was then a candidate for Road Commissioner, was canvassing house along Fishpond Road. He stopped at the Alford store. When he entered the store, he found the body of Mrs. Alford. She was lying face down in a pool of blood and was nude except for her shoes and ankle type stockings. She appeared to be dead. The Coosa County Sheriff's Department and other law enforcement agencies were summoned to the scene. A cordon was immediately established and the scene and body

were properly preserved for the ensuing investigation.

Mrs. Alford's body was later examined during an autopsy by Dr. Joseph Embry, a forensic pathologist. He determined that Mrs. Alford had died as a result of seventeen (17) exterior and eighteen (18) interior stab wounds to her upper left back. In addition, he found in her rectum a soft stool or feces. From this same area he took an anal swab, turning it over to the forensic criminlists Lawden Yates for analysis. On this anal swab Yates found the presence of semen and sperm.

Mrs. Alford's clothes were recovered completely intact without blood stains, a short distance form the body. The cash register of the store was empty and Mrs. Alford's brown leather wallet, the approximate value of $12.00 was missing.

During the course of immediate

investigation, two State Troopers, Officer Cribbs and Tapley, interviewed Mr.Smith, learned of the Respondent's actions on the Covered Bridge Road and crossed the bridge following the route the Respondent took. A short distance beyond the bridge they discovered a spin-rut off the side of the road, appearing to have been made by a motorcycle. They investigated the area near the rut and discovered what appeared to be another motorcycle spin-out or "spin-around". Near this second point, they found Mrs. Alford's missing wallet containing several checks payable to the store.

A short time after the Sheriff and other law enforcement officers arrived at the scene, the Respondent came to the scene of the crime accompained by memberd of his family. They expressed to talk to some of the officers. Either Davis or his mother stated to Sgt. Boggs, a State Trooper, that the Respondent had discovered

Mrs. Alford's body in the store. Davis was then interviewed by the Coosa County Sheriff, Vestin Peters. The Respondent first told Peters that he had found Mrs. Alford's body on the floor of the store. After further questioning, he admitted to changing his clothes before he came to the scene to talk to the officers and stated that the reason he had done so was because he lifted her body and had gotten blood on his other clothes. At this time the Respondent was held as a material witness.

Davis was later arrested and charged with robbery and the intentional killing of Mrs. Alford. The arrest came after Deputy Sheriff Neighbors obtained from the Respondents residence tennis shoes blue jeans, and a motorcycle helmet all spattered with what appeared to be blood. After his arrest, the Respondent's underwear was seized. The day following the robbery and killing of the victim,

and following the discovery of Mrs. Alford's wallet, an aluminum-handled kitchen knife was found a short distance from the front door of the Alford store. The knife blade was bent and it was believed to be the knife used in the intentional killing of the robbery victim.

During the early part of the investigation, Dupty Neighbors went to the residence of the Respondent's grandmother. Her home was also the residence of Davis. The grandmother admitted Neighbors and gave him opportunity to look through the house. He noticed two similar aluminum-handled kitchen knives, one longer and the other shorter in length that the one found at the Alford store. The existence of these similar knives was confirmed during the trial by the Respondent's mother.

All physical evidence in the case, including, samples of the victim's blood, the knife, his clothes, and motorcycle

helmet were submitted to the Alabama Department of Forensic Science for analysis. That analysis produced the following results:

(1) As to the knife, criminalists W.H. Landrum described it as a typical kitchen knife often existing as one of a set, and found the presence of type A blood on the blade. Dr. Embry found the knife by its lenght,width, and shape to be consistent with the weapon used to inflict the stab wounds on Mrs. Alfords back. He especially noted a wound in which her spinal cord had been struck and noted the "bent" shape of the knife blade, stating that such a "bend" would be compatible with such a blow.

(2) The victim's blood was typed as being A, Rh positive, MN, by Mr. Landrum. The Respondent's blood was typed by Landrum as O,MN.

(3) As to the helmet, Mr. Landrum found spots of blood across the top front portion, but in an insufficient amount to type or classify. As to the tennis shoes, Landrum found blood spots, type A, MN, on the toe area and on the bottom. (4) As to the jeans, Landrum found blood spatters across the front portion of the legs. He also found smeared blood stains aound the buttonhole above the zipper along the right front edge at the waist on both the interior and exterior, and on the inside of the right front pocket. The type of blood at the waist area, was type A, MN. Landrum noted that the smeared blood stains on the waist and around the buttonhold area were consistent with those a person would make pulling up his pants and fastening the button with a bloody right hand. (5) As to the underwear, Landrum found a smeared blood stain on the top right side at the waist, situated as to be consistent with that found in the same

area of the jeans, and also consistent with those stains a person would make pulling up his underwear with a bloody right hand. Landrum found on the front of the underwear the presence of semen, sperm, fecal material and epithelial cells. The latter he described together as coming from the rectum.

All the blood stains found by Landrum which could be typed and/or classified were consistent with the blood of the victim. None were found to be consistent with that of the Respondent.

Prior to the robbery and intentional killing of Mrs. Alford, Davis purchased a gold Honda motorcycle from one of his fellow employees. His name was Steve Colin. The Respondent promised payment for the motorcycle at some future date. While Davis and Colin were at work during the day of July 20, 1978, Colin told the Respondent that he had to pay for the motorcycle on the next day

because he planned to be married during the weekend and needed the money. The Respondent promised to pay what he owed him on the motor the next day, the day after the robbery and intentional killing of Mrs. Alford.

After the charge was placed against Davis and before this case was tried in the Circuit Court, Davis made a trip to the State of Georgia and while there became incarcerated in a Georgia Juvenile Detention Facility. While he was there he became acquainted with a fellow juvenile inmate named Tracey Bignaught. The Respondent told Rignaught about the crim e and described to him many details of how he committed the robbery and sodomy on Mrs. Alford and how he intentionally killed her during the robbery.

ARGUMENT

I.
THIS COURT'S DECISION IN BECK DOES NOT MANDANTE THE REVERSAL OF EVERY CASE TRIED UNDER THE ALABAMA DEATH PENALTY STATUTUE PRIOR THERETO

REASON FOR GRANTING THE WRIT: CONFLICT WITH BECK V. ALABAMA (447 U. S. 625 [1980])

In Beck v. Alabama (447 U.S. 625,65 L. Ed. 2d 392, 100S. Ct. 2382 [1980]) this Honorable Court considered the conviction and death sentence of a criminal defendant convicted and sentenced under a statute forbidding the consideration of lesser included offenses. In Beck it was clear and conceded that the evidence would have supported a finding of lesser included offenses. In summarizing the issue before it and its decision, this Honorable Court wrote:

> "...we granted certiorari to decide the following question;
>
> "'May a sentence of death constitu-

> tionally be imposed after a jury verdict of guilty of capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?' 444 U.S. 897,62 L. Ed. 2d 132, 100S. Ct. 204.
>
> "We now hold that the death penalty may not be imposed under these circumstances..." (447 U.S. 625, 627, 65 L. Ed. 2d 392,396).

Thus, Beck was carefully limited to its facts. In fact, this Honorable Court expressly declined to extend the Beck rule to non-capital cases. See Note 14, 447 U. S. 625, 638, 65 L. Ed. 2d 392, 403.

A review of how the Alabama Courts have applied the Beck rule to cases in whibh there is no evidence of lesser included offenses follows.

In Ritter v. State ([S. Ct. Ala., 1981] 403 S. 2d 154) the Alabama Supreme Court reversed, on authority of Beck v. Alabama,[1] supra, the conviction

of a criminal defendant who had pleaded quilty to the capital offense, frankly admitted his guilt and demanded the death penalty. In denying rehearing in Ritter, the Court wrote:

> "... we believe this result is compelled by the decision of the Supreme Court of the United States in Beck and is consistent with the interpretation of that decision reached by the Court of Appeals for the Fifth Circuit in Evans v. Britton, 639 F, 2d 221 [March 19, 1981] (1981), Which involved Ritter's partner in this crime..." (emphasis supplied)[2]

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[1] "... SHORES, JUSTICE

" Reversed and remanded to the Court of Criminal Appeals with directions to that Court to grant a new trial under the authority of Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382, 65 L Ed. 2d 392 (1980), and Beck v. State [MS. Dec. 19, 1980[. 396 So. 2d 645 (Ala. 1980).

"REVERSED AND REMANDED".

[2] Pending in this Honorable Court on writ of certioraru sub. nom. Hopper v. Evans, 80-1714, Certiorari granted June 22, 1981, sub. nom. Britton v. Evans 49 U. S. L. Wk. 3954

Ritter established a pattern for all the pre- Beck cases. Retrial was deemed required by this Honorable Courts decision and opinion in Beck, See, for example, Bracewell v. State (S. Ct. Ala., 1981) 401 So2d 130. [3] The orders in

---

[3] Initially the writ was denied on June 19, 1981, with a brief memorandum by Justice Maddox, which read:

"Petition for Writ of Certiorari is denied."

"By denying the writ of certiorari in this case, we assume that the Court of Criminal Appeals after reviewing the record in this case, has determined that there was some evidence presented which would have entitled the accused to an instruction on a lesser included offense.

"Writ denied." (unreported manuscript opinion) (Emphasis supplied).

However, six (6) days later Justice Maddox's opinion was withdrawn on the Court's own motion, and the following was issued:

"The opinion dated June 19, 1981, is withdrawn and the follwing, together with Justice Maddox's special concurring opinion, is substituted in its place. "WRIT DENIED." (Bracewell v. State [S. Ct. Ala., 1981] 401 So. 2d 130).

Thus, the possibility of a verdict of guilty of a lesser included offense was precluded by the evidence and the constitutional prohibition against arbitrary and capricious verdicts. In other words, the Preclusion Clause had no impact whatever on this case.

Nothing in this Honorable Court's Oplinion in Beck suggests a mandate for rubber stamp reversals of cases which could not have been affected in any way by the Preclusion Clause. In holding that it did, the Court of Criminal Appeals and Supreme Court of Alabama's decisions and opinions in this case are in conflict with Beck v. Alabama, supra.

A literal interpretation of Beck's "in every case" language is not required as the passage in question itself reveals. In that passage, this Court explained that the presence of lesser offense verdict options "may encourage the jury to convice for an impermissible reason" when

the jury has a "belief that the defendant is guilty of some serious ([lesser included] crime and should be punished." Beck v. Alabama, 447 U. S. at 642. The only time the jury could rationally reach a "belief that the defendant is quilty of some serious [lesser included] crime," is when there is some rational basis in the evidence for such a belief. Therefore, the only cases in which preclusion of lesser offnese verdict options could encourage capital offense convictions based on impermissible reasons are cases in which there is at least some evidentiary basis for a verdict convicting the defendant of a lesser offense instead of the capital offense.

The phrase "in every case" must also be limited insofar as it refers to the second "extraneous factor" set out in the paragraph of the Beck

opinion in question, which is that: "the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason that, whatever his crime, the defendant does not deserve death". 447 U. S. at 642-643 (footnote omitted). This Court cannot have meant that there was a constitutionally intolerable risk of acquittal in Alabama capital cases tried before the Beck decision, because this Court pointed out that there had been a 96% conviction rate in pre - Beck capital cases. 447 U. S. at 641 & n. 18. Surely, a 4% acquittal rate is not intolerably high.

What this Court did mean in the paragraph in question is evidenat from the particular argument that it was written to answer. Alabama had argued that any effect the pre-

slusion clause might have in influencing a jury to wrongfully convict defendant of a capital offense when the evidence showed that the defendant was guilty of a serious lesser offense would be offset by the effect of the seemingly mandatory verdict form requirements. The argument was that when there was an evidentiary basis for a lesser offense, the preclusion clause's push toward improper convictions would be offset by the verdict form's pull toward improper acquittals. Beck v. Alabama, 447 U. S. at 638-641. This Court rejected that argument. id., 639-643, but the important point here is that the language of the Beck opinion referring to an intolerable rish of erroneous factfinding "in every case" was intended to answer it. Because Alabama had argued that in every case like Beck in which there was an evidentiary basis for a lesser included

offense there would be an offsetting of pressures on the jury, this Court in rejecting that argument answered that in every such case "in every case" like Beck's there would be uncertain and unreliable factfinding, But in cases like the present one where there was evidentiary basis for a lesser included offense, there was no pressure on the jury to erroneously convict the defendant of the capital offense in order to prevent his release, because there was no reason for the jury to believe that he was guilty of a serious lesser and should not be acquitted for that reason.

In Ritter v. State, supra, three justices of the Alabama Supreme Court concluded that the Beck decision did not mandate the reversal of

a pre- Beck conviction in the unusual case where the record affirmatively and undisputably eliminateds and possibility that the defendant was harmed by the existance of the preclusion clause.[4] That is the correct interpretation of the Beck decision.

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[4]Those three justices of the Alabama Supreme Court were outvoted by a 6 member majority which concluded, "consisten[ly] with the interpretation of that decision reached by the 5th Circuit," that the Beck decision "compelled" the reversal of all pre- Beck capital convictions regardless of the facts. Ritter v. State, supra, slip op. at 2 (majority opinion) pp. 1a2a, infra, id., at 3 (Torbert, concurring specially), p. 2a infra.

The fact that a majority of the Alabama Supreme Court, influenced by the 2 member majority in the court below, joined that court in misinterpreting the Beck decision simply proves that this Court needs to correct both courts. This court has the opportunity to correct the Alabama Supreme Court's misinterpretation of Beck in Alabama v. Ritter, No. 81-247 (certiorari filed Aug. 6, 1981).

II.

THE DECISION BELOW IS CONTRARY TO DECISIONS OF THIS COURT CONCERNING HARM AND PREJUDICE AS A PREREQUISITE TO A DUE PROCESS FUNDAMENTAL FAIRNESS CLAIM AND AS A PREREQUISITE TO A REVERSAL WHEN A CONSTITUTIONAL VIOLATION IS ESTABLISHED

The decision below by the Alabama Courts is not based on any finding that the jury which convicted the respondent would have been instructed on any lesser included non-capital offense had it not been for the preclusion clause, nor is the decision below based on any finding that the mere existence of the preclusion clause actually affected respondent's defense strategy. What the court below did was to ignore the mandate of Beck v. Alabama, 447 U. S. 625 (1980), and follow the Fifth Circuit's erroneous decision in Evans v. Britton, 628 F. 2d 400 (5th Cir. 1980), opinion extended, 639 F. 2d 221 (1981), cert. granted, No. 80-1714 (U.S. June 22, 1981). In effect the Court below reached a decision which

was based on a holding that harm and prejudice are not necessary to a fundamental fairness claim based on Due Process Clause of the United States Constitution.

It is the posistion of the petitioner that the preclusion clause is not in any way harm of prejudice respondent since there was no evidentiary basis to charge the jury which convicted the respondent on any lesser included offenses. It is clear that under Alabama law a defendant is only entitled to a lesser included offense instruction if there is some evidentiary basis for it. See, e. g., Beck v. Alabama, 447 U. S. at 630 n. 5., quoting Fulghum v. State, 291 Ala. 71, 75, 277 So.2d 886, 890 (1973).

In the present case at trial there was substantial evidence against the defendant in regard to his robbery and intentional killing of the victim. There is absolutely no dispute that the

victim was in fact robbed and intentionally killed. The respondents defense was that of alibi. He claimed that it was impossible for him to be guilty of the crime because of his physical absence from the location of the crime. The respondent did not take the witness stand and no evidence was offered which would have warranted a finding of any lesser included offense. It appears from the trial record that the respondent simply relied on his alibi defense and stated that he was not the one who committed the crime.

The petitioner would note at this point that there is nothing in the record to evidence any argument that the repondents defense strategy was in any way influenced or affected by the existance of non-existance of the preclusionary clause.

For these reasons the petitioner must

again state that the Alabama court below misapplied Beck v. Alabama, supra. by holding that the Federal Constitution requires the respondent's conviction be overturned even though there is no evidence that the respondent was harmed or prejudiced by in any way the preclusion clause.

The finding by the court below that there is no requirement of harm of prejudice seems to fly in the face of this Honorable Court's decision in regard to fundamental fairness. Donnelly v. De Christoforo, 416 U. S. 637, 642 (1974). It is difficult to imagine how a defendant such as the respondent can argue that he has been treated unfairly when that treatment did not harm or prejudice him in any way. There should be no finding of a lack of fundamental fairness where there is not finding of some harm or prejudice that enured

to the respondent. The fundamental fairness violation can not exist independantly without the harm and prejudice factor. They must coincide with and are necessarily related to each other.

Prejudice is a necessay element of a due process claim concerning pre-indictment delay. United States v. Locasco, 431 U. S. 783,789-790 (1977); United States v. Marion, 404 U. S. 307, 325-326 (1971) ("the real possibility of prejudice inherent in any extended delay" is not sufficient, and defendants must "demonstrate actual prejudice".) Prejudice is also a prerequisite of a due process claim involving the suppression of exculpatory evidence, as United States v. Agurs, 427 U. S. 97 (1976), makes clear. Therefore, the decisions of this court establish that a finding of harm and can be prejudice is an essential component of a due process fundamental

fairness claim.

In addition, decisions of this Court establish that even where some constitutional right is violated, a related conviction should not be set aside if the violation did not contribute to the conviction. This Court has recognized "the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests," United States v. Morrison, 101 S.Ct. 665, 668 (1981), and it has ruled accordingly. See, e.g., id., at 667-669 (remedy for violation of right to counsel dependant on extent of harm caused by the infringment); United States v. Blue, 384 U. S. 251, 255 (1966) (remedy for violation of the Fifth Amendment is exclusion of statement, not barring the prosecution); Brady v. Maryland, 372 U. S. 83, 88-90 (1963) (remedy for suppression of

evidence material only to sentencing is limited to ordering a new sentence proceeding). Even where a constitutional violation stems from "the egregious behavior of the governmental agents", no remedy is to be imposed on direct or collateral appeal in the absence of harm. United States v. Morrison, 101 S. Ct. at 669.

Thus it can be seen that the decision by the Alabama Court below not only misinterprets Beck v. Alabama, supra, but it also misapplies and misinterprets Alabama law and other prior decisions of this Court. Noted above.

For this reason the decision below should not be allowed to stand absent some review by this Court. Therefore, this Court should grant this petition and consider the merits of the argument of these issues.

III.

IN THE ALTERNATIVE, THIS PETITION SHOULD NOT BE DIRECTED UNTIL THIS COURT DECIDES THE EVANS CASE

This brief and petition raise for this Courts consideration several separate yet related, important federal questions. Those questions deal with the proper interpretation of Beck v. Alabama, 447 U.S. 625 (1980) and the matter of the harm and prejudice requirement. These questions, the related facts and the law are almost identical to those raised and now under consideration in Hopper v. Evans, No. 80-1714 (cert. granted June 22, 1981).

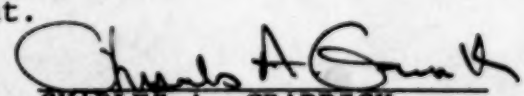
While there was no guilty plea in the present case as there was in the Hopper v. Evans case, it is still contended that the similarities between that case and this one are significant.

In addition the petitioner would

note that there are numerours other cases which are pending (Petition for Certiorari appled for) in this Court which also raise substantially similar legal issues. See: Alabama v. Wright, No. 81-1287 (cert. filed Jan. 11.1982); Alabama v. Daniels, No. 81-1397 (cert. filed Jan. 25, 1982); Alabama v. Bracewell, No. 81-1514 (cert. filed Feb. 8,1982) ; Alabama v. Bryars, No. 81-1513 (cert. filed Feb. 8, 1982); Alabama v. Hill, No. 81-1515 (cert. filed Feb. 8, 1982) . Because of the substantial similarity in the questions to be decided it is respectfully asked that if certiorari is not granted in this case (and the others now pending) then this case should be held until a decision is issued in Hopper v. Evans, supra.

CONCLUSION

In conclusion the Petitioner, the State of Alabama, respectfully submits that the decisions and opinions of the Court of Criminal Appeals and the Supreme Court of Alabama in this case present conflicts with the prior decisions and opinions of this Honorable Court. For this reason the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decision and opinions of the Honorable Court of Criminal Appeals and Supreme Court of Alabama and on such review will reverse the decisions of said Courts granting a new trial to the Respondent.



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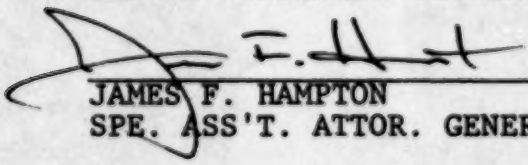

JAMES F. HAMPTON
SPE. ASS'T. ATTOR. GENERAL

CERTIFICATE OF SERVICE

I, James F. Hampton, a Special Assistant Attorney General of Alabama, and a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____ day of March, 1982, I did serve the requiste number of copies of the foregoing on the Attorney for the Respondent, by mailing same to him, first class postage prepaid and addressed as follows:

JAMES F. HAMPTON
SPE.ASS'T ATTORN.GENERAL

ADDRESS OF COUNSEL:

Office of the Attorney General
250 Administrative Building
64 N. Union Street
Montgomery, AL 36130

APPENDIX A

August 4, 1981

THE STATE OF ALABAMA- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1980-81

5 Div. 538

TIMOTHY CHARLES DAVIS
V.
STATE OF ALABAMA

APPEALED FOR THE COOSA COUNTY CIRCUIT COURT.

Per Curiam

The judgement of the conviction ir reversed and the cause remanded for a new trial on mandate of Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382, 65L Ed. 2d 392 (1980), on remand, 396 So2d 645 (Ala. 1981), and Ritter v. State, _____ So.2d. _____(Ala.1981)[77-798, MS. May 8, 1981].

REVERSED AND REMANDED.

All judges concur.

81-73 - Ex parte State (Re: Davis v. State)

JONES, JUSTICE

I respectfully dissent. I would grant the writ. See my dissent in Ex parte State (Re: Bryars v. State) [Ms. Dec. 11, 1981]
_____ So. 2d _____(Ala. 1981).

Maddox and Adams , JJ., concur

APPENDIX B

January 8, 1982

STATE OF ALABMA - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

October Term, 1981-82

Ex Parte: State of Alabama

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Timothy Charles Davis

v.

81-73

State of Alabama)

BEATTY, JUSTICE

WRIT DENIED.

Torbert, C.J. , Faulkner, Almon, Shores, and Embry, JJ.,

concur.

Maddox, Jones, and Adams JJ.,

dissent.

81-71- Ex parte State (Re: Davis v. State)

JONES, JUSTICE

I respectfully dissent. I would grant the writ. See my dissent in Ex parte State (Re: Bryars v. State) [Ms. Dec. 11, 1981]

_____ So. 2d _____ (Ala. 1981).

Maddox and Adams, JJ., concur.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

STATE OF ALABAMA,

Petitioner

Vs.

TIMOTHY CHARLES DAVIS,

Respondent

AFFIDAVIT CONCERNING MAILING

Before me, the undersigned notary, personally appeared James F. Hampton, who after being duly sworn, does depose and say as follows;

My name is James F. Hampton. I am a Special Assistant Attorney General of the State of Alabama, a member of the Bar of the United States Supreme Court, and counsel of record for the Petitioner in the above-styled case.

On March ___1982, I personally deposied in the Downtown Branch of the United States Post Office in Montgomery, Alabama,

a package containing forty copies of the Petition for a Writ of Certiorari in the above-styled case. The package was properly addressed and first Class postage, as calculated by postal employees at the time of mailing, was prepaid.

To my own personal knowledge, the mailing took place on March , 1982, as described herein.

_____

JAMES F. HAMPTON
SPECIAL ASS'T ATTORNEY GEN.

SWORN TO AND SUBSCRIBED
before me this _____
day of March, 1982.

_____
Notary Public

My commission expires _____

RECEIVED
MAY 10 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT
OF THE
UNITED STATES

STATE OF ALABAMA, *

PETITIONER *

VS * NO. 81-1662

TIMOTHY CHARLES DAVIS, *

RESPONDENT *

*

REPLY BRIEF OF RESPONDENT TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND THE COURT OF CRIMINAL APPEALS OF ALABAMA

BRUCE M. GREEN
JAMES C. PINO
Attorneys for Respondent

OF COUNSEL:

MITCHELL, GREEN, PINO & MEDARIS
Suite 205
Shelby Medical Center
Post Office Box 766
Alabaster, Alabama 35007
205/663-1581

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ARGUMENT

I.

THIS COURT'S DECISION IN BECK DOES MANDATE THE REVERSAL OF THIS CASE WHICH WAS TRIED UNDER THE ALABAMA DEATH PENALTY STATUTE PRIOR THERETO

The question presented for review is whether the decision of this Honorable Court in Beck v. Alabama (447 U.S. 625 [1980]) requires the automatic retrial of all cases tried under the Alabama Capital Punishment Statute prior thereto without regard to the evidence. Counsel for the Respondent is unable at this time to agree with or dispute the statement of facts as contained in the brief of the Petitioner as counsel for Respondent has been unable to obtain a transcript of the Circuit Court trial proceedings herein at the present time.

Assuming arguendo that the statement of facts as set forth in the brief filed by the Petitioner is correct, it is the position of the Respondent that the Death Penalty Statute, under which the Respondent was tried, convicted and sentenced to die, did include the "Preclusion" clause, and that said "Preclusion" clause may have had a chilling effect by restricting the Respondent's defense with respect to proof of facts and circumstances which may have been sufficient to invoke lesser included offense instructions.

In Ritter v. State (S. Ct. Ala., [1981] 403 So.2d 154) the Alabama Supreme Court denied rehearing and remanded the case for a new trial. In an opinion in which he concurred in part and dissented in part with the decision in Ritter, Justice Jones, stated in part:

> "I would hold that the test for answering the issue here presented for our consideration is whether the evidence of record is susceptible of any reasonable hypothesis giving rise to the application of the Lesser Included Offense Doctrine. Because such hypothesis may arise from either the presence or the lack of evidence adduced at trial, this test cannot be met unless the record of trial affirmatively precludes every reasonable hypothesis other than that of the Defendant's guilt of the capital offense as charged. Any reasonable doubt must be resolved in favor of granting the Defendant a new trial."

In Ritter, the Defendant took the stand and testified. In the case at bar, the Respondent (according to the Petitioner's statement of the facts) did not take the witness stand. Therefore, it would seem clear that the Respondent's defense may have been unduly restricted by the "Preclusion" clause and as a result no testimony or proof was presented sufficient to invoke lesser included offenses instructions.

II.

THE TRIAL AND SENTENCING PROCEDURES IN THE CASE AT BAR DO NOT COMPLY WITH THE TRIAL AND SENTENCING PROCEDURES REQUIRED BY BECK V. STATE

In Beck v. State (S. Ct. Ala., [1981] 396 So.2d 645) the Supreme Court of Alabama set forth the requirements for trial and sentencing procedures required under Alabama's Death Penalty Act. The Court stated in part:

> "We now hold that all trials conducted under Alabama's Death Penalty Act shall be as follows: A guilt-finding phase and, if the Defendant is found guilty, a sentence-determining phase."

It is submitted that even if this Court finds that the Respondent herein was not unduly restricted in his defense due to the chilling effect of the "Preclusion" clause, that he would be entitled to a new trial on the issue of sentence and in accordance with the Supreme Court of Alabama's decision in Beck after remand.

CONCLUSION

In conclusion the Respondent, Timothy Charles Davis, respectfully submits that the decisions and opinions of the Court of Criminal Appeals and the Supreme Court of Alabama in this case are not in conflict with the prior decisions and opinions of this Honorable Court. For this reason Respondent submits that Writ of Certiorari is not due to be granted in this case.

BRUCE M. GREEN
Attorney for Defendant-Respondent

JAMES C. PINO
Attorney for Defendant-Respondent

CERTIFICATE OF SERVICE

I, Bruce M. Green, Attorney of Record for the Respondent, Timothy Charles Davis, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 1 day of June, 1982, I did serve one (1) copy of the foregoing on the Attorney for the Petitioner, by mailing same to him, first-class postage prepaid and addressed as follows:

James F. Hampton
Special Assistant Attorney General
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

BRUCE M. GREEN

ADDRESS OF COUNSEL:

Suite 205
Shelby Medical Center
Post Office Box 766
Alabaster, Alabama 35007

RECEIVED
MAY 7 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

No. 81-1662

STATE OF ALABAMA *

PETITIONER *

VS *
TIMOTHY CHARLES DAVIS

RESPONDENT *

Motion For Leave to Proceed In Forma Pauperis

Comes now the Respondent, Timothy Charles Davis, in the above styled case and moves the Court for Leave to Proceed In Forma Pauperis pursuant to Rule 46 of the Supreme Court of the United States and as grounds therefor would show the Court as follows:

1. The Respondent in this case is indigent and is presently incarcerated on death row within the prison system of the State of Alabama.

2. That on February 2, 1982, the Honorable Bruce Green and the Honorable James Pino were appointed by the Circuit Court of Coosa County, Alabama, as counsel for Timothy Charles Davis for purposes of trial in the Circuit Court for Coosa County, Alabama, [a copy of said Order is attached hereto as Exhibit A].

3. That on March 22, 1982, the Honorable Bruce Green and the Honorable James Pino were appointed by the Circuit Court

of Coosa County, Alabama, to represent Timothy Charles Davis in connection with any and all appellant proceedings involving Timothy Charles Davis [a copy of said Order is attached hereto as Exhibit B].

Bruce M. Green, Attorney for
Respondent, Timothy Charles Davis

James C. Pino, Attorney for
Respondent, Timothy Charles Davis

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion for Leave to Proceed In Forma Pauperis on the Honorable James F. Hampton, Office of the Attorney General, 250 Administrative Building, 64 N. Union Street, Montgomery, Alabama 36104, by placing a copy of same in the U. S. Mail, postage prepaid on this the 5 day of May, 1982.

Bruce M. Green

Exhibit A

IN THE CIRCUIT COURT OF COOSA COUNTY, ALABAMA

STATE OF ALABAMA,)
) CRIMINAL CASE NO. CC-79-12
VS.)
)
TIMOTHY CHARLES DAVIS,)
DEFENDANT)

ORDER APPOINTING COUNSEL
AND SETTING ARRAIGNMENT DATE

This Court having previously allowed the attorneys of record for defendant, Timothy Charles Davis, to withdraw, it is necessary that other counsel be appointed to represent, assist and defend the defendant during all proceedings in this case, it is therefore;

CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court as follows:

1. That Honorable Bruce Green, a practicing attorney who has more than five years practice and who practices at the Shelby County Bar and elsewhere, is appointed to represent, assist and defend the defendant, Timothy Charles Davis, on the capital charge made against him by the Coosa County Grand Jury.

2. That Honorable James Pino, a practicing attorney who has less than five years experience and who also practices at the Shelby County Bar and elsewhere is appointed as counsel for the defendant, Timothy Charles Davis.

3. That arraignment is set for February 18, 1982, in the Court-room of the Coosa County Courthouse at Rockford, Alabama, at 11:00 a. m.

4. That defendant and his appointed counsel shall be present at such arraignment.

5. That the Sheriff of Coosa County, Alabama, Honorable William A. Evans, is directed to obtain custody of the defendant from the

Alabama penal authorities and place him in the Coosa County Jail on such date as will assure his presence at his arraignment.

Done and Ordered at Chambers this 2nd day of February, 1982.

KENNETH F. INGRAM, CIRCUIT JUDGE

Exhibit B

IN THE CIRCUIT COURT OF COOSA COUNTY, ALABAMA

STATE OF ALABAMA,)
)
VS.) CRIMINAL CASE NO. CC-79-12
)
TIMOTHY CHARLES DAVIS,)
DEFENDANT.)

ORDER CONTINUING THIS CASE FOR ARRAIGNMENT
AND FOR MATTERS RELATIVE TO
APPELLATE PROCEEDINGS TO THE UNITED STATES SUPREME COURT

By Order of this Court dated February 2, 1982, Honorable Bruce Green and Honorable James Pino, practicing attorneys who have more than five years in the practice of law, were appointed to represent, assist and defend the Defendant, Timothy Charles Davis, on the capital charge made against him by the Coosa County Grand Jury. The defendant's arraignment was set for February 18, 1982, but at the request of defendant's counsel joined by the district attorney the Court continued the arraignment generally. During the intervening time between February 2, 1982 and this date the Court is informed that this case has been appealed to the United States Supreme Court by the Attorney General of Alabama. This Court is not informed at this time officially as to whether or not the State's Petition for Writ of Certiorari to the United States Supreme Court will be granted. But pending such determination by that Court, it is the opinion of this Court that this case should be continued on the docket until such time as disposition can be made of it in accordance with the opinion of the United States Supreme Court, it is therefore;

CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court as follows:

1. That this case is continued generally in accordance with the above stated information.

2. That the defendant shall remain in the State Penal System until the further order of this Court.

3. That the previously appointed Attorneys of Record, Honorable Bruce Green and Honorable James Pino, shall constitute the Attorneys of Record for this defendant for all proceedings, whether appeal or trial; that such appointment began on February 2, 1982 and will continue for all purposes until changed or modified by some subsequent order of this Court.

Done and Ordered at chambers this 22nd day of March, 1982.

KENNETH F. INGRAM, CIRCUIT JUDGE